IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

J U D G M E N T

THE STATE OF RAJASTHAN. V. ASAN KUMAR & ANOTHER.

D. B. CRIMINAL APPEAL NO. 34/87

Under Section 378 (iii) & (i), Cr.P.C.,against the Judgment dated 02-09 1986,passed by Shri J.K.Dasani, RHJS,Sessions Judge, Pali, in Sessions Case No.29/84.

DATE OF JUDGMENT :::: 09-10-2007

PRESENT

HON'BLE MR. JUSTICE BHAGWATI PRASAD

HON'BLE MR. JUSTICE MUNISHWAR NATH BHANDARI

Mr. J.P.S.Choudhary, P.P., for the State – appellant.
Mr. Doongar Singh, for respondents.

BY THE COURT: (PER HON'BLE MR. BHANDARI, J.):-

The State has preferred this appeal against the judgment

dated 02.09.1986, passed by the Sessions Judge, Pali, in Sessions Case No.29/84.

Brief facts pertaining to the case are that on 29.03.1984, at around 7.00 a.m., Udai Singh, Head Constable No. 596, Police Station, Guda Endla (Pali) made a report that from Keerva to Pali road, a dead body was seen, pursuant to wireless message received. When said Head Constable reached there, then Kan Singh, Jagdish Singh, Chhail Singh and Prabhu Ram Meena were found at the place where the dead body was lying. On inspection of the place, it was found that body was pulled from road side, where blood was also found. On the right hand of the body, "Nek Singh" was found to have been inscribed. The body was having tire impression on the head as well as on the abdomen. It seems that somebody had caused accident by rash and negligent driving, causing death of the person. Pursuant to the said report, a case under section 304-A, IPC, was registered, bearing FIR No.29/84. Subsequently, one Sahab Singh made a report to the Police Station, Guda Endla Camp Rai, stating that Nek Singh was his uncle's son. Nek Singh and Ishwar Singh had purchased Truck No. HYS 570 in partnership. Ishwar Singh had, thereafter, paid entire amount and taken truck in his name. Nek Singh had employed Rohitash as Driver and Asan Kumar as Cleaner on 25.03.1987. The truck was loaded with coal ash from Shop No.4,

Delhi for Borunda (Rajasthan). Driver Rohitash had not boarded and truck was driven by Nek Singh who was accompanied by Cleaner Asan Kumar and one Rajveer. Complainant Sahab Singh had shown his presence at the time when the truck started from Delhi. The complainant had given description of clothes and other articles like ring and watch of Nek Singh. On 03.04.1987, said complainant received an information that Truck No. HYS 570 is lying near Kishangarh Petrol Pump and its tires are found to be flat. On this information, Driver Rohitash was sent to Kishangarh, who then informed that the truck was lying near Kishangarh Petrol Pump and, on inquiry from nearby Hotels, it was given out that the said truck is lying from 28.03.1984 evening. The truck was loaded with cement with a builty of Gurgaon, hence after repairing the tires, it was taken to Gurgaon and after unloading the truck, the same was taken to Delhi. Nek Singh, Asan Kumar and Rajveer were not found. However, seat covers of the truck were found blood-stained. On search of these three persons, an information was received from Sojat Police Station that a dead body is found having name of "Nek Singh" on his right hand. After inquiry, it was found that the said body was of the complainant's cousin brother. On search, Asan Kumar and Rajveer were not found. On submission of the said report, a case was registered.

After registration of the case, Police conducted usual investigation and, thereafter, filed challan in the Court of Chief Judicial Magistrate, Pali, from where, the case was transferred to the trial Court. The trial Court framed charges against the accused under Section 304, IPC. Charges were denied by the accused, who then claimed trial.

At the trial, prosecution produced nineteen witnesses and seventy-three documents were exhibited, whereas, in defence, no witness was examined and three documents were produced. The statements of the accused were recorded under Section 313 of Cr.P.C.

The learned trial Court acquitted both the accused vide its impugned judgment, by giving them benefit of doubt. The learned trial Court could not find convincing evidence so as to convict accused.

Learned Public Prosecutor, appearing on behalf of the State – appellant, urged that the learned trial Court has failed to appreciate prosecution evidence in a proper manner, though prosecution had produced chain of circumstances to connect accused with the crime. It was argued that the prosecution had produced witness Sahab Singh to show that the accused and

deceased were last seen together. However, accused failed to give a proper explanation of Nek Singh escape while making a statement under Section 313 of Cr.P.C. Apart from the evidence of last seen, blood-stained seat covers of truck were recovered, pursuant to the information given by accused Rajveer vide Ex.P-25, yet the trial Court ignored the said evidence to complete chain of events to show involvement of two accused in the crime. Enlarging further arguments, it was urged that even PW 9 Ganga Singh was produced to show that the truck passed through Octroi Check Post of Municipality on 28.03.1984, where an octroi receipt was issued. However, this event was ignored by the trial Court, mainly on the ground that in haste, truck number was mentioned as 517, instead of 570. According to the learned counsel for the appellant, it was a case having strong evidence to prove crime against the accused, yet they were given benefit of doubt by the trial Court. It was, thus, prayed that the order of the trial Court be set aside.

Learned counsel appearing for the accused submitted that it was a case where no eye witness of the occurrence was existing, therefore, prosecution tried to prove its case, based on circumstantial evidence, though the evidence produced in that regard, was quite doubtful, rather the statement of Sahab Singh itself was sufficient to show that it was nothing but a creation of

prosecution, because occurrence said to have taken place in the mid night of 27th/28th of March, 1984 and the FIR was lodged by the complainant Sahab Singh on 12th April, 1984, whereas Rohitash Singh brought the truck on 5th April, 1984 itself which was then found to have blood stained, seat covers and, at the same time, not only deceased Nek Singh, but Asan Kumar and Rajveer were also found missing. The said Sahab Singh could not clarify as to how this truck was loaded with cement to be unloaded at Gurgaon, whereas, according to his statement, truck was loaded on 25.03.1984 with coal ash for its delivery at Borunda (Rajasthan). Therefore, according to the learned counsel for the appellant, prosecution tried to create doubtful evidence to some how prove their case which was then properly scanned by the trial Court and looking to the fact that no convincing evidence was existing to connect accused with the crime, coupled with the fact that even no motive could be shown to commit an offence under Section 302, IPC, by the accused, the trial Court rightly gave benefit of doubt to the accused. Thus, according to the learned counsel for the non-appellants, the judgment of the trial Court deserves to be maintained.

We have consider rival submissions of the learned counsel for the parties and carefully examined the matter.

It is a case which is based on circumstantial evidence, thus, it is necessary for us to see as to whether the prosecution could lead proper evidence to connect accused with the crime beyond doubt. For this purpose, the facts narrated by the witnesses require to be scanned minutely, because prosecution could not show any motive of accused to have committed an offence under Section 302, IPC. Though motive is not necessary to prove a crime, but in a case of circumstantial evidence, if motive is missing, then the matter is required to be examined minutely, so that in no case, an innocent person is convicted.

The learned trial Court considered following circumstances while adjudicating the matter, so as to see that the prosecution has succeeded in proving those circumstances or not and to further see as to whether those circumstances are sufficient to connect accused with the crime :-

(1) Accused Asan Kumar made extra-judicial confession before the Police.

(2) PW 18 Sahab Singh had stated that deceased was seen last with the accused.

(3) The recovery of transport builty at the instance of the

accused showing that Asan Kumar made forged signature of deceased Nek Singh.

The three circumstances were considered by the trial Court and found that the prosecution could not prove its case to connect accused with the crime beyond doubt. To see as to whether findings of the trial Court are proper or not, it is necessary to see the statements of relevant witnesses along with the material.

So far as the first circumstance is concerned, it pertains to extra-judicial confession made by accused Asan Kumar before the police. Before going to the fact, it is necessary to see the legal position as to whether such confessions can be read against the accused or not ? For this purpose, it is necessary to refer to Section 24 to Sec. 30 of the Evidence Act along with Sections 162 and 164 of the Cr.P.C. The substance of these provisions is that if an accused makes confession of his crime before the Police, then the same is not admissible in evidence. The confession of guilt can be made admissible in evidence when same is recorded by Magistrate. In the present matter, Ex.P-6 is a statement of accused Asan Kumar recorded while he was in custody of the police. Therefore, said document and confession of the accused cannot be read against him, rather it is

inadmissible in evidence. According to the prosecution, on 10.04.1984, when a Police party was on patrolling, then accused Asan Kumar was seen in suspicious condition, having a plastic bag. The said person was stopped and on inspection, it was found that he was having opium and one .12 bore pistol along with four cartridges, out of which two were found alive. At that stage, accused Asan Kumar gave story of killing deceased Nek Singh which was then reduced in writing vide Ex.P-6 and the same is projected as extra-judicial confession of the accused. We find that the evidence led by the prosecution by producing PW 4 Madan Gopal, PW 5 Tika Ram and PW 6 Pratap Singh shows that their evidence is quite unnatural because accused Asan Kumar was cought by them on 10.04.1984, having opium and a .12 bore pistol and at that stage, while they are making a case against him regarding carrying of opium, he made a disclosure about the murder of Nek Singh. We fail to consider as to how an occasion arose for Asan Kumar to make a disclosure of case of murder when he was found carrying opium and, for that reason, a case was to be registered. If the natural consequence of event is seen, then the Police will conduct investigation about the opium and cannot remotely show concern or any connection of said person with an unknown case of murder. It seems that Ex.P-6 was created in an unusual manner, though the investigating agency is expected to know that such type of

confessional statements cannot be recorded while an accused is in custody of Police. Rather if it is done by the investigating agency, then it creates doubt against their actions and the witnesses produced to prove extra-judicial confession of the accused cannot be believed. Not only for the reason that their behaviour is unnatural, but even in view of the legal provision that a confession made by the accused while in custody of Police is not admissible in evidence.

We may refer to the judgment of Supreme Court in AIR 1963 SC 1113 and AIR 1966 SC 119, in which the Hon'ble Supreme Court held that if a person himself is an accused, then even if such person has given first information to the Police about his guilt, then also, such information cannot be read in evidence, though the accused was not in the custody of the police. In the present matter, admittedly, accused Asan Kuamr was stopped by the Police and while case was to be registered for recovery of opium, the extra-judicial confession was recorded in the presence of Police. Hence, in our opinion, we cannot accept first circumstance as proved, rather looking to the legal restrictions and prohibition to look into extra-judicial confession of accused while in the custody of the police, it was not even proper for the prosecution to produce such evidence which otherwise questions their credibility. Accordingly, we do not find

first circumstance as proved or legally sustainable.

The second circumstance rests on the statement of PW 18 Sahab Singh who had last seen deceased with the accused. PW 18 Sahab Singh stated that deceased Nek Singh was his cousin brother. On 25.03.1984, the truck was loaded with coal ash for its unloading at Borunda (Rajasthan). The truck was driven by Nek Singh and accused Asan Kumar was accompanying him. If the statement of PW 18 Sahab Singh is taken into consideration, then the only fact proved is that on 25.03.1984, the deceased was last seen with the accused. However, the occurrence is of mid-night of 27th and 28th March, 1984, therefore, after seen deceased with the accused, a period of two days passed in between which is quite material, in view of the story given by the witness Sahab Singh himself, at the time of filing FIR. According to said Sahab Singh, on 03.04.1984, he received an information from HRTC Company Delhi that Truck No.HYS 570 is lying on Kishangarh Petrol Pump. On the said information, said truck was brought by Driver Rohitash on 05.04.1984, after unloading cement at Gurgaon. According to the report made by Sahab Singh, Rohitash had given out that on inquiry from hotel people, it was given that the truck was lying at Kishangarh Petrol Pump from 28.03.1984 and a builty for delivery of cement was also lying there. The prosecution has failed to take note of this

aspect, because when the truck started from Delhi, it was loaded with coal ash and if the story given by Sahab Singh in FIR is taken note of, then it becomes that coal ash was unloaded and, thereafter, even cement was loaded, having a builty for its delivery at Gurgaon, therefore, the material issue becomes as to in whose presence, cement was loaded and having details of loading of cement in builty, why the witnesses were not produced to show that even Nek Singh was seen along with the accused at the time of loading of cement or at least at the time when coal ash was unloaded. All these facts are relevant and important in the present matter, because it is a case based on circumstantial evidence and issue of accused last seen is a crucial fact, but such crucial fact cannot be proved in the manner it has been done by the prosecution. Even the trial Court has not taken cognizance of all these facts while recording its finding in favour of the accused.

It is otherwise surprising that even after knowing about the truck lying at Kishangarh Temrol Pump on 03.04.1984, followed by a fact of unloading of cement in Gurgaon on 05.04.1984, Sahab Singh did not make any report to the Police when not only Nek Singh, Asan Kumar and Rajveer Singh were found missing under the circumstances that the seat covers of the truck were found blood stained. All these facts speak against

prosecution, because FIR was lodged on 12.04.1984 and, in between, complainant Sahab Singh and others kept silence, despite of finding truck in unclaimed condition at Kishangarh Petrol Pump. Thus, we do not find statement of PW 18 Sahab Singh to be reliable and otherwise, looking to the event narrated during the period of two days from 25.03.1984, it cannot be said to be a case where accused was last seen with the deceased, because such event of last seen had taken place almost two days before the incident.

The other circumstance, on which prosecution relied, was in regard to the recovery of articles, at the instance of the accused. In this respect, statement of PW 16 Ummaid Singh is first required to be described. Said witness stated that he had recovered Exhibits P-33 to P-42. However, the said witness could not show that at the time of recovery of those documents, any "Fard" seizure was prepared, rather it was admitted that no "Fard" was prepared. Now, referring to these documents, which are builties, nothing has come out, beause prosecution has tried to project that Asan Kumar signed those builties by making forged signatures of Nek Singh by projecting himself to be Nek Singh. To prove forged signatures and projection of accused Asan Kumar as Nek Singh, the best witnesses were those, in whose presence such signatures were made. However, the

prosecution has deliberately not produced any such evidence to prove either the document or a fact that accused Aasan Kumar signed those documents, projecting himself to be Nek Singh. Thus, it cannot be ruled that if those witnesses could have been produced, then they may not have supported prosecution case.

The prosecution produced PW 19 Ganga Singh who was deputed on Octroi Check Post, Municipality, Nimbaj on 28.03.1984. He had issued Ex.P-71 for Truck No. HYS 570. Said witness admitted that he had wrongly written Truck No. as 517, but, again, said witness has not shown that the document was signed in the name of Nek Singh or on his behalf. Rather, a line is existing in the back side of builty, is not being proved as signature. Thus, said witness also becomes irrelevant. PW 16 Ummaid Singh was further shown to be a witness who stated that accused were arrested and at the instance of Rajveer, he had recovered a shirt and seat covers of the truck, which was found standing at Asawarpur on 13.04.1984. Two seat covers were further recovered near Bilara which were concealed in a pit having water near the road. By showing these recoveries, the Police has tried to connect accused Rajveer with the crime, more so, according the Police, an iron rod and a hammer were also recovered at the instance of Rajveer. If we look at the evidence led by the prosecution, then it comes out that there seems to be

failure of the investigating agency to investigate this case properly. When the FIR was lodged on 12.04.1984, stating that truck is having blood stained seat covers, then recovery of said seat covers could have been made by the Police, otherwise, however, it was shown to be at the instance of Rajveer. Further, it is surprising that the Police had further recovered two seat covers near Bilara which were concealed in a road side pit filled with water. It is quite unusual because if the accused were to conceal those seat covers, then the same would not have been concealed at a place which is on the road side and in any case, even if it is assumed that those seat covers were concealed, then, no blood can be found as it remained in water, in view of the prosecution story itself, but prosecution had recovered two seat covers from pit, showing it to be blood stained, therefore, we find that the prosecution has tried to create a doubtful evidence against the accused, in all manners. At the instance of other accused Asan Kumar, articles belonging to deceased were recovered from his residence, thus the fact remains that apart from hammer and iron rod and certain articles belonging to accused were recovered, but the record shows that the hammer and iron rod were not found to be blood stained, rather PW 16 Ummaid Singh admitted that those articles were recovered, in view of the suspicion that it may be blood stained. So far as the recovery of articles belonging to deceased Nek Singh is

concerned, the identification of those articles were made only by Sahab Singh and the prosecution has not produced any witness to corroborate his statement, though deceased's wife, father and son could have been called to prove that articles recovered, were belonging to the deceased, because they were the best person to prove this fact. However, again, prosecution had not produced material witness which would have been in the best condition to state as to whether articles were belonging to deceased or not. Therefore, it seems that there is utter failure of the prosecution to conduct the case properly or it may be that the prosecution has tried to prove its case, without there being any convincing evidence.

Considering the material discussed above, we find that three circumstances projected by the prosecution to complete the chain of events to connect accused with the crime were either not found to be events admissible in evidence or could not be proved and lastly, if proved, were not sufficient to connect accused with the crime. We have recorded our finding that fact regarding extra-judicial confession was inadmissible in evidence, coupled with our finding on issue that it is not a case where deceased was last seen with the accused, because gap of 2-3 days has not been explained, more so, when some events took place in between as described in the judgment and lastly,

recoveries made by the investigating agencies were again either inadmissible or irrelevant and could not be proved by producing the best witness available for it. Therefore, in these circumstances, we find that there is a failure of the prosecution to prove its case which is clear from the discussions made by us, apart from the fact that even the trial Court recorded its finding that the prosecution could not prove case against the accused beyond doubt. The finding recorded by the trial Court cannot be said to be perverse.

In view of the discussions made above, we do not find any merit in the appeal preferred by the State. Thus, the same is dismissed. Accused need not to surrender.

(MUNISHWARNATH BHANDARI),J.(BHAGWATI PRASAD),J

scd